United Nations AT/DEC/1153

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1153

Case No. 1203: POUDEL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Charu Chandra Poudel, former staff member of the United Nations Population Fund (hereinafter UNFPA), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and thereafter until 30 September 2001;

Whereas, on 29 June 2001, the Applicant Poudel filed an Application requesting the Tribunal, inter alia:

"5. ...

(3) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for denial of due process;

(4) to order that: the Applicant be reinstated; the Applicant be paid retroactively for the period from 1 January 2001 until the date of reinstatement; the period of 15 August 2000 to 31 December 2000 be treated as special leave without pay, as a disciplinary measure; or to order that the Applicant be paid three years base salary in lieu of reinstatement;

(5) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for damage to his reputation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 29 November 2002;

Whereas, on 25 July 2003 the Tribunal decided to postpone consideration of the case until its autumn session.

Whereas the facts are as follows:

The Applicant entered the service of UNFPA on a fixed-term appointment as Assistant Programme Officer at the NO-A level, in Kathmandu, Nepal Country Office, on 2 January 1987. At the time of the events relating to the Application, he held a permanent appointment as Assistant Representative at the NO-B level, UNFPA, Kathmandu.

On 8 October 1999, the Applicant and four colleagues, all of whom were employed in the UNFPA Nepal Country Office and were members of its Procurement Committee, wrote to the Chief, Office of Oversight and Evaluation, UNFPA, informing him of alleged irregularities and violation of procurement rules and procedures at the Country Office. They held the UNFPA Representative responsible, and maintained they had been coerced by him into compliance. They requested an investigation of the matter.

As a result of the complaint, the Office of Audit and Performance Review (OAPR), United Nations Development Programme (UNDP), constituted a special audit team on 10 November 1999, "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal.

The report of the OAPR special audit team entitled "disciplinary and performance related matters" concluded that there was evidence of unsatisfactory conduct on the part of the Applicant, and recommended that disciplinary action be initiated against him. In particular, it noted that he had signed minutes of meetings of the Local Procurement Committee which had not been held; he had improperly received a commission of 1,000,000 rupees from another staff member, and had not reported it until after he had returned it a few days later; and that he had failed to exercise his oversight and supervisory authority over certain of his subordinates, which resulted in "major financial and procurement irregularities". The Applicant was provided with a copy of the report on 18 February 2000, asked to provide comments by

6 March and warned that failure to provide a satisfactory explanation would result in his case being submitted to the Disciplinary Committee. The Applicant responded on 2 March, stating that another staff member, the Administrative Assistant, had prepared the minutes under the direction of the Representative and that he (the Applicant) had been subjected to harassment until he agreed to sign them. With respect to the bribe, he claimed that the Administrative Assistant had given him one million rupees, which he returned a few days later. He had delayed reporting it because he was unsure to whom he should make such a report; and upon ultimately reporting the bribe to the Representative, the latter had decided not to take action. The Applicant stated that he had drawn the attention of the auditor's to the matter. Insofar as his supervisory functions were concerned the Applicant explained that the Representative had prevented proper supervision to be exercised at the office.

On 3 March and again on 9 March 2000, the Applicant requested written copies of written statements made by himself and his colleagues in connection with the Special Audit" as well as audio cassettes containing interviews given to members of the audit team. These requests were not honoured.

On 10 April 2000, the Applicant was charged with the following "accountability and disciplinary charges":

> "A. Signing minutes of the Contracts Committee meetings which did not take place;
>
> B. Failing to comply with UNFPA procurement procedures in 1998 and 1999, by participating in the irregular award of a contract to the architect ... and to the sub-contractors involved in the construction projects;
>
> C. Failing, in the absence of [the Representative] while on leave or on mission, to exercise proper supervisory authority over subordinates involved in procurement, leading to overpayments to sub-contractors and to the architect in the order of 15 to 38% over market price;
>
> D. Failing ... to immediately report the receipt of a bribe from [the Administrative Assistant]."

On 27 and 28 June 2000, the Applicant was permitted to listen to the tape recording. He was sent a copy of the transcript on 28 June.

On 28 June 2000, the UNFPA Representative, *a. i.*, advised the Applicant that he was being suspended from duty with pay, with immediate effect. He was informed that certain audiotaped conversations involving himself and two other staff members,

as well as a statement that he had collected bribes, were considered to have established *prima facie* evidence of serious misconduct on his part, and corroborate his participation in a bribery scheme, as well as in other violations of the most basic standards of conduct, financial rules and procedures. The Applicant was advised that these allegations were in addition to those with which he had already been charged but that no decision would be taken on any of the charges until his full comments were received. He was given until 18 July to respond. The Applicant denied the allegations registered against him in his response of 18 July, and asserted that the audiotaped conversation had no legal standing or evidentiary value as it had been "maliciously, illegally" recorded without official authorization and lacked proper authentication. He contended that the dialogue recorded merely constituted an attempt on the Applicant's part to lure the Administrative Assistant into exposing the existance of other bribery attempts as well as the complicity in these improprieties by the Representative.

The Officer-in-Charge of UNDP responded on 15 August 2000, stating, inter alia,

> "On the legality of [the] evidence, with or without the tape recording, there are many witnesses corroborating your conversation during this March 2000 meeting. You have admitted being present at that meeting, and you have never denied the substance of the discussions that took place. In the Organization's view, this tape recording, together with other evidence, constitutes valid and sufficient proof of the tenor of the conversation, which all witnesses recognize took place. ...
>
> ...
>
> For the above reasons, it has been decided to reject as untrustworthy your explanations of 17 April and 17 July 2000 on the various charges laid against you, and ... to summarily dismiss you from service under Staff Regulation 10.2, effective on the date of this letter..."

The Applicant requested that his case be referred to the Joint Disciplinary Committee for review. Pursuant to his request, the case was referred to an *ad hoc* Disciplinary Committee (DC) on 26 October 2000. During the course of the proceedings, a video-conference was arranged in Bangkok in order to enable the Applicant and his counsel to cross-examine the Administrative Assistant who remained in Nepal. The Administrative Assistant could not be found on the appointed day of the conference and the conference proceeded in his absence. The AHDC submitted its report on 23 November 2000. Its findings and recommendation read, in part, as follows:

"... **THE FINDINGS, INDICATING WHICH, IF ANY, APPEAR TO BE SUPPORTED BY THE EVIDENCE**

A. In signing documents of Contracts Committee meetings that did not take place, [the Applicant] conspired to conceal the irregularities that were occurring in the UNFPA Nepal office;

B. As member of the Contracts Committee, [the Applicant] had a role not only in reviewing but also of approving the recommendations of the committee to the UNFPA Representative. In so doing, he failed to comply with UNFPA procurement procedures in 1998 and 1999 and participated in the irregular award of a contract to the architect ... and to the sub-contractors involved in the construction projects;

C. [The Applicant] had supervisory responsibility to ensure that his subordinate in charge of finance and administration, was fully conversant with all related rules and regulations, including the need for detailed procurement schedules and payments in large construction contracts. In the absence of [the Representative] while on leave or on mission, he is guilty of failing to exercise his supervisory authority over subordinates involved in procurement, leading to overpayments to sub-contractors and to the architect in the order of 20-30% above the market price;

D. [The Applicant] is guilty of failing to act immediately upon receipt of a bribe from [the Administrative Assistant]. His delay in further reporting the matter when he knew that [the Representative] had chosen to ignore the incident, further implicated him in irregularities within the office;

E. [Participating in a meeting in March 2000,... confirming his involvement in a bribery scheme and his attempts to foster a new scheme with the Representative, involving UNFPA construction projects.] [The Applicant] is guilty of the charge of bribery. He is clearly boastful on the tape of his involvement in setting up a bribery scheme within the office. He admits to having received monies from an earlier publishing contract ...

**... ADVICE OF THE AD HOC DISCIPLINARY COMMITTEE TO THE ADMINISTRATOR**

In view of the above evidence and counter-evidence, and in the absence of any mitigating circumstances, the Committee finds [the Applicant] guilty of serious misconduct and recommends that the decision of summary dismissal be upheld and that UNFPA reserves its right to recover from [the Applicant] the bribes, losses and overpayments which occurred in this case and to which he was party."

On 21 December 2000, the Administrator, UNDP, transmitted a copy of the report to the Applicant and informed him that he had decided to maintain the decision to summarily dismiss him.

On 16 February 2001, the Applicant requested review of the decision of the Administrator who, on 11 May 2001, advised him that the decision stood.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions in are:

1. The Applicant was a scapegoat for the irregularities committed by the Representative.

2. The Applicant's rights of due process were violated throughout. In particular, he was not given a copy of the audit report or his statements to the auditors and he was not notified of the charges against him; he was convicted based upon an inaccurate transcript; and, he did not have an opportunity to cross-examine the Administrative Assistant.

3. The punishment imposed on the Applicant was disproportionate.

4. The Applicant suffered embarrassment and economic hardship because of the publicity UNFPA gave the case.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was a valid exercise of the Secretary-General's discretionary authority.

2. The Applicant was accorded due process. The contested decision was in no way vitiated by substantive or procedural irregularity, and, the Administration acted correctly in presenting new allegations to the Applicant.

3. The decision was not vitiated by bias, improper motivation, or other extraneous factors.

4. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated on 25 July 2003 in Geneva and from 22 October to 18 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal to rescind the Administration's decision to separate him from service and requests three years base salary in lieu of reinstatement. He also claims an additional payment of two years net base salary for damage to his reputation and for denial of due process.

II. The case concerns the imposition of a disciplinary sanction based on allegations that (i) the Applicant signed minutes of Contracts Committee meetings which did not take place; (ii) failed to comply with UNFPA procurement procedures in 1998 and 1999 by participating in the irregular award of a contract to an architect; (iii) failed to immediately report receipt of a bribe; and (v) participated in a bribery scheme.

The Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters and has established its own competence to review such decisions only in certain exceptional conditions, *e.g.*, in case of failure to accord due process to the affected staff member before reaching a decision". (See Judgments No. 542, *Pennacchi* (1991); No. 941, *Kiwanuka* (1999).) The Tribunal also held in Judgment No. 641, *Farid* (1994), para. IV, that it will intervene if the administrative action is "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact".

III. The Applicant claims that his due process rights were denied because (a) he was not provided with a copy of the Audit Report on which the charges against him were based; (b) the most serious charge against him, "Charge E," which was "participating in a bribery scheme related to construction projects" was changed to "confirming his involvement in a bribery scheme and his attempts to foster a new scheme with the Representative involving UNFPA construction projects"; (c) he was found guilty of a charge he never saw until three weeks before the AHDC hearing, based on a tape recording made by a witness he was not permitted to cross-examine, despite UNDP's commitment to arrange a video-conference; and (d) the presentation of an allegedly edited and inaccurate transcript of the tape to the AHDC by the Administration constituted denial of due process.

In the course of his submission, the Applicant invokes UNDP circular UNDP/ADM/97/17 para.2.2, which provides that

> "if an allegation of misconduct is made, the affected staff member shall be notified in writing of all allegations and of his/her right to respond, provided with copies of all documentary evidence of the alleged misconduct and advised of his/her right to ... counsel".

In Judgment No. 744, *Eren et al.* (1995), para. XV, the Tribunal stated that, "in accordance with the staff rules, as well as fundamental principles of fairness, an accused staff member must be fully apprised of the charges against him/her so as to know what to respond to".

The Tribunal noted that the Applicant was advised that an audit had disclosed irregularities in connection with (i) his signature on minutes and notes to the file of Contract Committee meetings that had never taken place; (ii) his failure to promptly report a bribe; and (iii) his failure to properly oversee the actions of his subordinates, resulting in financial losses to UNFPA. He was provided with a summary of the Audit Report and a copy of the applicable disciplinary rules. He was also advised of his right to seek assistance of counsel and was given an opportunity to submit comments in explanation of his actions. The Tribunal is satisfied that the Applicant had been afforded sufficient information relating to those charges, and thus, his complaints in this regard must fail.

IV. As to the Applicant's complaints that there was undue delay and/or failure on the part of the Administration to make available to him records of prior statements made by him and/or records of interviews, natural justice and due process require that a person facing a charge should be provided with sufficient information as to what is being alleged against him as is required to enable him to make a meaningful answer. This would not ordinarily embrace the Applicant's own statements but rather the statements of other persons who would be giving evidence against him. This is so particularly where his credibility is an issue so that the fact finding body (in this case the AHDC) would be interested to know if there was to be a change in his account or if it would remain consistent. It is not for that body to provide the person under investigation with such resources as he may need to enable him to remain consistent in his evidence or explanation. He has therefore failed to satisfy the Tribunal that his complaints in this regard constitute a denial of due process or show that he was treated unfairly.

V. The Tribunal will now deal with the Applicant's complaint arising from what he describes as a late amendment or addition of the final part of the fifth charge made against him, "Charge E", namely "his attempt to foster a new scheme with the Representative involving UNFPA construction projects". The Tribunal is satisfied that this complaint is without substance, as no finding adverse to him was made in this

regard. In any event, the Tribunal does not consider a three-week notice inadequate, because the amendment in question was largely based on the audio recording and transcript thereof, which had been given to him several months prior to the AHDC hearing. The Tribunal finds that he had adequate time to deal with the charge.

VI. The Tribunal now moves to deal with the charge of "active participation in a bribery scheme", which is said to have been based on the secret recording of the meeting of early March 2000 and which had been carried out by the Administrative Assistant. The Applicant had complained initially regarding the integrity of the tape itself and of the completeness of the transcript and of the accuracy of the translation. It is now accepted by him that the tape itself had not been tampered with, but the Applicant still maintains his complaints regarding the completeness of the transcript and the accuracy of the translation.

This tape had been played to the Applicant following meetings between the Applicant and the Chief, Legal Section that were held on 27 and 28 June 2000. A copy of the tape and the transcript were furnished to the Applicant by the UNFPA Representative, *a.i.*, under cover of a letter dated 28 June 2000. That letter informed him that the tape and transcript disclosed a *prima facie* case of serious misconduct in participating in a bribery scheme, and his comments were invited. The Applicant replied by letter of 17 July 2000. Far from denying that the tape had recorded him as saying at the meeting that he had participated in a bribery scheme, the Applicant firstly objected to the admissibility of the tape recording on the grounds that it had been recorded secretly and without his knowledge and that it had not been taken by a person "authorized to conduct a taped interview". Likewise, he did not immediately complain either about the integrity of the tape or the adequacy or completeness of the transcript. (Later in this same letter, the Applicant made passing allegations regarding the integrity of the tape, but these allegations subsequently have been withdrawn.) When confronted by the evidence of the tape, his reaction was rather to admit that his input was indeed recorded but to explain that he had said what had been said in order to lure the Administrative Assistant to discuss more about the case and to obtain more facts and documents. He described that

> "during [his] discussions with [the Administrative Assistant, he] made an effort to raise [the Administrative Assistant's] confidence in [him] so that he would confide in him all the inner dealings between [the Administrative Assistant] and the Representative and so that [the Administrative Assistant] could share documents of

evidentiary value with him which could prove that the Representative was getting financial benefits".

He says that during the discussion he "was trying to indulge the Administrative Assistant into an open discussion and for that purpose he spoke openly to lure the Administrative Assistant into giving out more facts against the Representative". He concluded his comments on this aspect by saying "[t]his was the only way I could get his confidence to obtain evidence from him. Therefore in the tape recording I have spoken certain words which have been made the basis for my suspension."

The Tribunal can only interpret these explanations and comments which were offered by the Applicant to mean that, at the meeting with the Administrative Assistant, although the Applicant had said that he had participated in a bribery scheme, he was really just bragging or boasting of his involvement in a scheme where he had not actually participated, and he was just inventing this so as to set the Administrative Assistant at his ease, so that the Administrative Assistant might feel comfortable to open up, confess his own misdeeds and, perhaps, also to inculpate the Representative.

In the light of the Applicant's admission as to what he had said on tape, it seems to the Tribunal that the complaints regarding the integrity of the tape, the adequacy of the transcript and the competence and accuracy of the translation and the failure of the Administrative Assistant to attend the video-conference at the meeting of the AHDC, in Bangkok, become of much less importance, generally, and of no importance in relation to what the Applicant actually said. In essence, the words in the letter to the UNFPA Representative, *a.i.*, constitute an admission that at the meeting in question the Applicant had admitted to having participated in a bribery scheme. The issue now remains as to whether he was telling the truth on that occasion or telling the truth in his subsequent explanation to the Acting UNFPA Representative in the Applicant's letter of 17 July 2000, when he had been confronted with the evidence of the tape.

In the opinion of the Tribunal, it seems far fetched in the extreme that the Applicant should have been speaking untruthfully at the meeting with the Administrative Assistant in March 2000, which, unbeknownst to him, was being taped and that his explanation was truthful when he was confronted by the evidence of the tape. The Tribunal finds it impossible to believe that what was said by the Applicant in the course of the tape-recorded meeting at the Administrative Assistant's house was mere bragging about an event which had not occurred, merely done for the purpose of

putting the Administrative Assistant at his ease in the hopes that the Administrative Assistant might open up and admit to his own wrongdoing or implicate the Representative. This explanation would enjoy some plausibility had it been the Applicant or his colleague, the Finance Assistant, who had engaged in the secret tape recording, but it seems to the Tribunal to be a bizarre and wholly implausible explanation when this was not the case. It appears to the Tribunal to be far more plausible that the Applicant was being untruthful when he was confronted by the evidence of the tape recording and required to make an adequate explanation for what he had been recorded as saying at the meeting concerned. In this regard, the Tribunal is reinforced in its conclusion as to the lack of reliability of the Applicant as a witness by reason of his injured credibility arising from his statements regarding a one million rupee bribe. When describing the circumstances of that bribe, the Applicant had changed his evidence in a material respect when he explained the timing of the bribe. Initially, he had claimed that the bribe was collected in September, 1999; later he stated that the bribe was collected in mid-1999, a date which is denied by all other witnesses who corroborated that the Applicant had engaged in the bribery. The Tribunal is satisfied that a basis, independent of the tape and its transcript, exists to support the finding that the Applicant had participated in the bribery scheme, as was charged.

In Judgement No.1009, *Makil* (2001), para.IV, the Tribunal noted that:

> "[It] will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the point of the said finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations."

It also noted in *Makil*, para.V, that

> "It was for the JAB to resolve this credibility issue and it did so in favour of the Executive Director ... In the opinion of the Tribunal, this was an issue of fact pre-eminently and properly suitable for resolution by the JAB, having considered the evidence. The Tribunal considers that it ought to stand as the Applicant has failed to demonstrate either that the finding was not supported by evidence or that the evidence supporting it was false or was not worthy of belief."

VIII. The Applicant argues that his inability to cross-examine the Administrative Assistant violated his rights to due process. Specifically, the Applicant argues that had he been able to cross-examine the Administrative Assistant, he would have been able to wholly undermine the Administrative Assistant's credibility and integrity as a witness. Even if that had been established, this would not affect the Tribunal's findings as to the Administrative Assistant's involvement, since the Tribunal has placed no relevance on the Administrative Assistant's testimony in reaching its conclusion. Since the Tribunal finds implausible the Applicant's explanations for his admissions that he participated in a bribery scheme, and as the Tribunal determines that the Applicant's admissions, coupled with his lack of credibility as a witness, form an independent basis for the conclusion that the Applicant participated in the bribery scheme, any cross-examination of the Administrative Assistant would have no relevance to "Charge E".

IX. The Applicant contends that the purported minutes of meetings of the Contracts Committee, which did not take place, were prepared under the instruction and guidance of the Representative. The Applicant further claims that the prevailing rules of hierarchy and authority made it impossible for him to object to signing these false documents. He added that he was not allowed supervisory authority over staff. The Tribunal finds not credible the Applicant's assertions. It is clear that the Applicant failed to exercise his oversight and supervisory authority over the Senior Administrative and Finance Assistant, and the Administrative Assistant, respectively. This led to major financial and procurement irregularities as well as functional disruption in the office operations, which were not reported to the Representative and Headquarters.

The Tribunal, like the AHDC, does not accept the Applicant's explanation that he was not allowed by the Representative to exercise his supervisory authority over the Administrative Assistant, as constituting a legitimate excuse for his failures. Furthermore, the AHDC, which had seen and heard both the Applicant and the Representative, concluded that the Applicant possessed a strong and robust character: "it would not appear that he was the sort of person who would shy away from challenging authority". Therefore, it did not accept that he had been intimidated by the Representative. The Tribunal also notes that the Applicant joined his colleagues in signing the letter of 8 October 1999, reporting the procurement irregularities committed by the Representative of the UNFPA. This is further evidence of the

Applicant's strong and robust character, which provides further ground for rejecting his assertion that he acted out of fear of reprisal.

X. In the light of the foregoing, the Tribunal finds that arguments presented by the Applicant are not convincing. Consequently, it upholds the finding that the Applicant (i) participated in a bribery scheme; (ii) failed to comply with UNFPA procurement procedures; (iii) conspired to conceal the irregularities by signing documents of Contracts Committee meetings that did not take place, (iv) that the Applicant's failure to exercise his supervisory authority over subordinates involved in procurement led to overpayment to sub-contractors and to the architect in the order of 20-30% above market price; and (v) that the Applicant failed timely to report receipt of a bribe.

XI. Accordingly, the Tribunal rejects the Application in its entirety.

*(Signatures)*

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1154

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1154

Case No. 1124: HUSSAIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 14 December 2001, Sehba Hussain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 15 February 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*PLEAS*

...

(c) UNICEF New York be directed to pay me for legal costs incurred. This amounts to approximately $50,000. Additionally, UNICEF New York be directed to pay me the losses incurred by my forced early separation in terms of loss of regular earnings as well as loss in pension benefits. Finally, UNICEF New York be directed to compensate me suitably for the psychological trauma, loss of faith amongst Government Officials, UNICEF colleagues and friends. ...

(d) [I be awarded any] other relief which the ... Tribunal deems reasonable in the circumstances of the case ...

(e) In the interest of justice, I may be given an opportunity of a personal hearing ...

(f) UNICEF New York be directed to issue a letter of censure to concerned persons ...

...

(h) The ... Tribunal is requested to specifically examine ... the report of the JAB ... for arriving at decisions which are correct in law. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002 and periodically thereafter until 14 January 2003;

Whereas the Respondent filed his Answer on 10 January 2003;

Whereas the Applicant filed Written Observations on 10 Novemebnr 2003;

Whereas, on 15 November 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a fixed-term appointment as a Project Officer at the NPO level, in Lucknow, India, on 15 September 1981. On 6 August 1985, the Applicant resigned from the Lucknow Office in order to join the Thimphu Office/UNICEF in Bhutan, as a Programme Officer at the L-3 level. She advanced to the L-4 level, effective 1 September 1987. On 31 May 1988, the Applicant resigned from her post in Bhutan and, on 1 June 1988, transferred to New Delhi, India, as a Programme Officer, Health, where she reverted to the NPO level. She was granted a probationary appointment on 1 September 1989, and was reassigned to the Lucknow Office as Zone Representative on 1 January 1990. She received a permanent appointment on 1 March 1990. On 1 January 1992, her title was changed to Chief, Field Office, Lucknow. At the time of her separation on 31 March 1998, she held the position of State Representative (STAR) at the NO-D level in Lucknow, India.

*Ad hoc Enquiry Panel*

In May 1997, complaints were brought to the attention of the Applicant regarding her direct supervisee by the Assistant Director of the Department of Education of Uttar Pradesh. Apparently, it was found that in liquidating of certain accounts, monies were not used for the purpose intended. Following extensive correspondence on the issue, on 1 August 1997, the Special Representative, India Country Office (ICO), New Delhi, established an Ad hoc Enquiry Panel to investigate

thee following issues: (1) the complaint from the Assistant Director of the Department of Education, (2) certain allegations of "harassment" made by the supervisee against the Applicant, and (3) the issue of liquidation of advance accounts raised by the Applicant.

The Ad hoc Enquiry Panel found that the "workplace rift" between the Applicant and her supervisee had been long-standing and was deteriorating; that the work environment at Lucknow office was not optimal; and, that harassment, as defined in the dictionary, had taken place. On 27 August 1997, the Special Representative, ICO, forwarded the report of the Ad hoc Enquiry Panel to the Applicant for her comments, which she provided, early September 1997.

On 21 November 1997, the Special Representative, ICO, advised the Applicant that "[h]aving considered the [Ad hoc] Enquiry Report, your response and the Panel's review of your response and that of [the Applicant's supervisee], I have come to the conclusion that the report's findings and conclusions stand as they are except for the typological [sic] errors in regard to [the Applicant's supervisee]'s [performance evaluation report (PER)] ratings which I have accepted to be corrected ..." He concluded that: "As far as management is concerned we consider the case closed".

*Swapping of post encumbered by the Applicant from NPO to IPO*

On 22-23 May 1997, a meeting was held on the Programme Budget Review (PBR) for South Asia, in Bangkok, Thailand, with a view to strategic reorganization of the ICO. As a result, with the best interests of the India Country Programme in mind, the Special Representative, ICO, decided that the NO-D post in the Lucknow office, encumbered by the Applicant, would be swapped with the IPO post of Chief, Mumbai, which was vacant.

In August of 1997, the Special Representative met with the Applicant in Manessar to discuss the implications of the decision to internationalise the STAR post occupied by her. In the course of this meeting, he offered the Applicant an equivalent post at the NO-D level in New Delhi, which she declined. Moreover, the Applicant did not apply for any vacant posts at her own or higher level.

On 19 September 1997, the Chief of Personnel Services, ICO, informed the Applicant that the decision to internationalize her post would take effect as of January 1998, and that UNICEF Headquarters would be asked to advertise her post. He stated that: "As you have not expressed interest in serving in other posts in UNICEF India and have opted instead for separation from UNICEF on conversion/abolition of your post, the six-month notice period of your separation from UNICEF's service will take effect from 1 October 1997 [to expire] end of March 1998." He asked the Applicant to sign the lower portion of the letter to indicate her acceptance of the proposed terms of her separation (12 months' pay plus an additional 50%).

On 30 September 1997, the Applicant signed the lower portion of the aforementioned letter, stating that: "I, hereby, accept the above mutually agreed terms of my separation from UNICEF service which I will not contest". However, she included the following notation: "My acceptance may kindly be viewed against the context of my forwarding letter dated [30 September 1997] which reflects that the unilateral decision taken to internationalise my post is a clear divergence from the recommendation of the [Management Advisory Group] and the approval of the PBR at Bangkok under the chairmanship of the Regional Director, Regional Office for South Asia (ROSA) as communicated to all staff in UNICEF, India".

In a letter dated 21 October 1997 to the Deputy Executive Officer (Operations), UNICEF, the Applicant stated as follows: "[w]hile I have opted to separate voluntarily, I have done so in the interest of dignity and self-respect".

On 3 November 1997, the Chief of Personnel Services, ICO, replied to the Applicant's letter of 30 September 1997. He stated that he understood from the Special Representative that, in his private meeting with the Applicant in Manessar in August of 1997, she had been informed of his decision to convert the STAR post in Lucknow to international, in line with what was agreed upon at the May 1997 PBR meeting in Bangkok, and that the Special Representative had offered the Applicant the possibility to serve in another equivalent post at her level, which she declined in favour of pursuing other professional interests outside UNICEF. The Chief of Personnel Services, ICO also assured the Applicant that the conversion of her post to international had nothing to do with the Enquiry which took place at the Lucknow office.

On "2/4" December 1997, the Applicant wrote to the Executive Director, UNICEF, in order to request a review of (i) the conduct and report of the *Ad hoc* Enquiry Panel; and (ii) the conversion of her post from NPO to IPO.

On 5 December 1997, the Applicant appealed to the JAB for a suspension of action. On 15 January 1998, the Presiding Officer of the JAB notified the Applicant that her request for suspension of action had been rejected because: (1) the report of the Enquiry Panel had already been completed and submitted, and (2) the decision to convert the post at Lucknow had also been implemented.

On 16 March 1998, the Deputy Executive Officer (Operations), UNICEF, responded to the Applicant's request of "2/4" December for administrative review. She informed the Applicant that she supported the Special Representative's decision to accept the report of the *Ad Hoc* Enquiry Panel in its final form. With respect to the conversion of the Applicant's post, the Deputy Executive Officer confirmed and amplified what the Chief of Personnel Services, ICO, had stated in his letter of 3 November 1997. Accordingly, she emphasized that there was no connection between the investigation by the Enquiry Panel and the decision to swap posts: while the enquiry began in August 1997, the decision to swap posts had been discussed in May 1997.

On 30 March 1998, the Applicant lodged an appeal with the JAB. The JAB submitted its report on 11 June 2001. Its conclusions and recommendations read, in part, as follows:

> ***"Conclusions and recommendations***
>
> 52. ... [T]he Panel *unanimously agreed* that the Appellant had not been charged with misconduct, that her case never went beyond the phase of the preliminary investigation, and that there were no fundamental flaws in the conduct of the *Ad Hoc* Enquiry Panel. However, it also *unanimously agreed* that the finding of harassment and the adoption of that finding cast serious doubt about the managerial competence and moral integrity of the Appellant without giving her an effective forum or opportunity to defend her name, and that the improper closing of the matter caused injury to her morale and professional reputation. The Panel *unanimously recommends* that the Appellant be paid three months net base salary in compensation for the injury caused by the ICO Administration in the wake of the preliminary investigation. It also *unanimously recommends* that the UNICEF Administration issue a letter of commendation to certify the Appellant's long and devoted service.

> 53. Furthermore, the Panel *unanimously agreed* that there was no adequate evidence showing a linkage between the establishment of the *Ad Hoc* Enquiry Panel and the decision to swap the post encumbered by the Appellant from NPO to IPO. ..."

On 26 November 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "While agreeing with all other findings and conclusions of the Board, the Secretary-General cannot accept the finding concerning the Enquiry Panel's use of the term 'harassment'. Contrary to the Board's finding that the term 'harassment' was used in a 'loose' manner, the Enquiry Panel took care to rely on the definition of that term in the Oxford Dictionary. Furthermore, it is difficult to reconcile the Board's conclusion that the term was used improperly with its earlier conclusion that the Enquiry Panel respected all requirements of due process and fairness. The Secretary-General considers that no cognisable right of yourself as a staff member was violated by the Enquiry Panel's use of that term, as defined, and no evidence has been presented in support of the finding that the use of that term was injurious to you. Accordingly, the Secretary-General has decided not to accept the Board's recommendation for compensation and to take no further action on your appeal. ..."

On 15 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The *Ad hoc* Enquiry Panel in its establishment, composition and procedure violated the Charter, Staff Regulations and Staff Rules of the United Nations.

2. The *Ad hoc* Enquiry Panel was investigating allegations of harassment against the Applicant without affording her the protection set forth in Chapter 15 of the UNICEF Human Resources Manual Disciplinary Measures & Procedures. The Applicant was found guilty of misconduct, yet the relevant procedures as stipulated in the Staff Regulations and Staff Rules were not followed by UNICEF.

3. There was documented evidence to prove that the investigation by the *Ad hoc* Enquiry Panel and the decision to convert her post from NPO to IPO were inextricably linked in the sense that the whole exercise of enquiry was undertaken to ensure the Applicant's exit.

4. The Applicant's desire and intention to continue working for UNICEF were misrepresented. Her ouster was a basic denial of both Human Rights and staff rights.

Whereas the Respondent's principal contentions are:

1. The constitution and conduct of the *Ad hoc* Enquiry Panel were reasonable and fair.

2. The conversion of the Applicant's post from NPO to IPO was not linked to the *Ad hoc* Enquiry Panel or influenced by prejudicial factors.

3. The Applicant, and not the Respondent, bears the responsibility for her "post-less" situation.

4. The Notice served by the Chief, Personnel Services, ICO, was properly issued.

5. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 23 October to 18 November 2003, now pronounces the following Judgement:

I. The Applicant joined UNICEF, India, in 1981 and following a number of promotions and reassignments became Chief, Field Office, Lucknow, India. At the time of separation from service on 31 March 1998, she was State Representative (STAR) at the NO-D level, in Lucknow.

II. The Applicant experienced problems in her office with regard to her direct supervisee. In particular, she received complaints about him from the Department of Education of Uttar Pradesh, regarding financial matters. The Applicant and her supervisee expressed diverging opinions on those matters, and the disagreement between them escalated to the point that the supervisee's second reporting officer in the supervisee's PER for the year 1996, felt obliged to recommend a detailed review at the duty station by an independent third party. In a memorandum dated 1 August 1997 addressed to the Applicant, the Special Representative, ICO, announced the establishment of an Ad hoc Enquiry Panel to look into the case.

III. The Enquiry Panel prepared a draft report and requested the Applicant to present her comments. On 21 November 1997, the Special Representative, ICO, informed the Applicant that the final report was written taking into account her comments; that the draft report was substantially maintained; and, concluded that "as

far as management is concerned [they] consider the case closed". It is important to note that in that report, as accepted by the Administration, it was stated, inter alia, that the supervisor had harassed her supervisee, and that the Administration decided not to investigate the matter.

IV. In the meantime, another procedure affecting the Applicant's position in the Organization was going on, i.e. a reorganization exercise.

On 22-23 May 1997 the Programme Budget Review (PBR) was taking place in Bangkok, Thailand, where it was decided, inter alia, in line with an earlier PBR Committee decision that all state offices be headed by international professionals. On 10 June 1997, the Chief of Personnel Services, ICO, briefed the section chiefs via e-mail on the Bangkok meeting and informed them that the second phase of the proposed restructuring was to "implement the approved posts changes which will involve decisions on staff". The restructuring directly affected the post encumbered by the Applicant, as it was included among those posts that would be "internationalized".

In August 1997, the Applicant was offered an equivalent post at the NO-D level in New Delhi, which she declined. She also did not respond to the Administration's invitation to apply for any vacant post at her own or at a higher level. On 19 September 1997, she was informed that as she had not applied for any other post, she had opted for separation from service, which would indeed take effect after the six-month notice period, starting 1 October 1997 and expiring at the end of March 1998. She was asked to sign the lower portion of the letter, indicating that she accepted the proposed terms of separation, which she did.

Nevertheless, some time later, the Applicant asked for administrative review (i) of the decision of the Administration to accept the Enquiry Panel's report containing adverse conclusions and not to review the case in more detail, which eventually would clean her file from considerations that could harm her in her future professional goals, as well as (ii) of the decision to separate her from office. According to her, the Administration's decision to separate her from service was influenced by the findings in the Enquiry Panel's report against her.

In the proceedings that followed, the JAB unanimously concluded that there was no adequate evidence showing a linkage between the establishment of the Ad hoc Enquiry Panel and the decision to swap the post encumbered by the Applicant from NPO to IPO. On the other hand, it also unanimously agreed that the Administration did not give her any effective forum or opportunity to defend herself against a report

which was accepted by the Administration, and which concluded that she had committed harassment, and that by so doing the Administration caused injury to her morale and professional reputation. For that reason, the JAB recommended that she should be compensated by three months net base salary. The Secretary-General did not accept the recommendation made by the JAB.

V. The Tribunal does not agree with the Secretary-General. It is a well established principle of law, part of the wider principle of due process, that whoever is accused of any wrongdoing must be given a fair opportunity to defend him/herself within a proper procedure.

It is, of course, within the discretion of the Administration to institute ad hoc enquiry panels whenever it finds that it is necessary, as the Administration did in the present case. The Administration did not harm any legitimate interests of the Applicant, since the Enquiry Panel followed the proper procedures, and she was given a fair opportunity to express her views on the draft report.

It was nevertheless the responsibility of the Administration to either suppress that part of the report relating to the determination that she was guilty of harassment once it determined not to proceed, or to initiate a proper investigation, particularly when a staff member, as did the Applicant, requests that such an investigation be conducted. It is not within the power of a staff member to compel the Administration pursue disciplinary proceedings. Conversely, the Administration should only resort to administrative action (rather than disciplinary proceedings) when it does not prejudice or damage the position of staff and is not detrimental to staff. (See Judgement No. 877, *Abdulhadi* (1998).)

VI. In view of the above, the Tribunal concurs with the JAB's findings with regard to the Enquiry Panel's report, as it does with its other conclusion that there is no evidence that the Applicant's separation from office was the result of the conclusions of the Enquiry Panel's report. In fact, the Tribunal notes that the Applicant had agreed in writing to her separation from service. On the other hand, the Tribunal finds that the compensation proposed by the JAB was inadequate protection for the Applicant's interests. The only way to redress her complaint would be to remove that portion of the report that refers to harassment.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to remove from the Enquiry Panel's report any reference to or inference of harassment;
2. Orders the Respondent to pay the Applicant three months net base salary at the rate in effect at the date of the Judgement as compensation for the injury suffered; and,
3. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1155

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1155

Case No. 1250: THIAM Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-President, presiding; Ms. Brigitte Stern; Ms. Jacqueline R. Scott;

Whereas, on 23 September 1993, Oumar Doudou Thiam, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application (1) requesting the Tribunal, inter alia to order, as compensation for loss of sight in the right eye, the retroactive application of the provisions of Appendix D to the Staff Rules relating to loss of function (in this case loss of sight in the right eye).

Whereas on, 28 July 1995, the Tribunal rendered Judgement No. 715, in which it considered that in declaring the claim time-barred, the Advisory Board on Compensation Claims (ABCC) acted in an arbitrary manner and that this aspect of the case should be considered on its merits; found that the ABCC did not set forth its observations, conclusions and the reasons for its recommendations sufficiently clearly; remanded the case to the ABCC so that a proper report could be prepared; and, determined that if the results were not satisfactory to the Applicant, he could invoke the provisions of Appendix D, article 17, to request the convening of a medical board.

Whereas, on 1 March 2001, the Applicant again filed an Application (2) requesting the Tribunal to order immediate payment of Applicant's disability benefits

as estimated by the secretariat of the United Nations Joint Staff Pension Fund (UNJSPF) on 8 August 1984.

Whereas on 26 July 2002, the Tribunal rendered Judgement No. 1068, rejecting the Application in its entirety. The Tribunal held that

> "It is evident that this result is different from that in Judgement No. 715, where the Tribunal decided on humanitarian grounds to receive the Application. First, the Applicant could have raised these issues in the Application that led to Judgement No. 715. Also, while the basic facts are alike in the two cases, the relative importance of certain events is not the same in the two Applications, because different claims are made."

Whereas, on 18 May and again on 12 October 2000, the Applicant filed further applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 February 2002, the Applicant, after making the necessary corrections, again filed an Application (3), requesting the Tribunal to:

> "Order full application of article 11-1(b) of Appendix D to the Staff Rules taking into account the health condition of the Applicant and the importance of his disability as certified by all the ophthalmologist doctors consulted, including the eye expert doctor recommended and designated by the Director of the United Nations Medical Service.
>
> ... [O]rder payment of all medical, hospital and directly related costs of [the ] Applicant's illness after his separation from the Organization as authorized by recommendations of the []. The Applicant is claiming compensations to be paid as authorized by the relevant recommendation of the [ABCC] and not mere reimbursement of medical invoices. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 August 2002 and once thereafter until 30 November 2002;

Whereas the Respondent filed his Answer on 12 September 2002;

Whereas the Applicant submitted an additional communication on 10 October 2003;

Whereas the facts additional to the facts set forth in Judgements No.714 and No. 1068 are as follows:

On 8 July 1991, the Applicant wrote to the Secretary of the ABCC, requesting that his case be reopened and that he be provided with compensation under article 9 of Appendix D to the Staff Rules, for "loss of vision [in] right eye".

Following submission of further evidence, the ABCC reconsidered the case at its 347th meeting on 8 October 1992. Having found there was no indication that there was a service-incurred injury at the time indicated, or other circumstances warranting the waiver of the time-limit, the Board recommended to the Secretary-General, that the claim for compensation under Appendix D not be accepted. The Secretary-General approved the ABCC recommendations on 2 November 1992.

On 7 April 1993, the Applicant requested the Secretary-General to reconsider his determination that the Applicant's injury to his right eye was not attributable to the performance of official duties, and on 3 May 1993 this request was forwarded to the ABCC. On 24 June 1993, the Applicant was informed that his claim had been denied.

On 23 September 1993, the Applicant filed an application with the Tribunal. In its Judgement No. 715, the Tribunal remanded the case to the ABCC so that a proper report could be prepared. On 15 March 1996, the ABCC reconsidered the case at its 372nd meeting, deciding that it required additional medical information and it requested the Secretary to obtain the following: (a) the report of the physician who first saw the claimant after the alleged incident and who referred him to an ophthalmologist; (b) the report of the ophthalmologist; and (c) to inquire whether a medical exit exam was performed when the claimant separated from UNHCR and, if so, to obtain a copy.

On 23 April 1996, the Applicant submitted a more comprehensive and chronological summary of the events and circumstances regarding his claim to the Secretary, ABCC. In his submission, he stated that "my left eye which was not been injured during this mission is in excellent shape".

At its 373rd meeting of 30 April 1996, the ABCC reviewed the case again and recommended that the Applicant's loss of vision in right eye be recognized as attributable to the performance of official duties and that he be awarded compensation in the amount of $24,383.52, equivalent to a twenty-four (24) per cent loss of function of the whole person, as provided under Article 11.3 of Appendix D to the Staff Rules. On 13 May 1996, the Secretary-General adopted the recommendations of the ABCC.

On 7 August 1996, the Applicant addressed a letter to the ABCC, objecting to the determination of loss of function of 13 May 1996. He transmitted an ophthalmological report dated 31 July 1996, prepared by an independent

ophthalmologist in Vienna. This report referred to the Applicant's loss of sight in his right eye, and mentioned that his left eye had now developed a cataract, rendering him "unable to fulfil his professional duties". The ophthalmologist in question stated that the Applicant's professional disability at that time amounted to "at least 80%".

On 13 September 1996, the Director, Medical Services Division, (the Medical Director) informed the ABCC that it appeared that the Applicant's left eye condition could be considerably improved with proper treatment. Therefore, before making a recommendation on whether the percentage of permanent loss of function should or not be modified, the Applicant would have to "undergo all necessary treatment(s) that are indicated for his left eye condition". On 24 September 1996, the ABCC informed the Medical Director that the Applicant had submitted another medical report dated 19 September 1996 from the ophthalmologist in Vienna. According to the report, the only appropriate treatment would be a successful cataract operation with lens implantation, which the Applicant was not willing and could not be obliged to undergo. The ABCC asked the Medical Director for advice.

On 10 October 1996, the Medical Director, informed the ABCC that in her medical opinion, "the impairment of vision caused by cataract formation in his left eye now suffered by [the Applicant] is not and cannot be the result of the blunt injury which he previously suffered in his right eye". The Medical Director concluded that "there is [sic] no medical grounds to conclude that the determination originally made by the ABCC that [the Applicant] suffered 24% impairment of the whole person should be disturbed, altered or amended in any way because of the non-service-incurred impairment of the vision in [the Applicant's] left eye". The Applicant was so informed on 30 October 1996.

Following a further request for advice dated 21 January 1997, the Medical Director informed the Secretary, ABCC, that her earlier decision of 10 October 1996 stood.

On 11 July 1997, the Medical Director was asked to determine whether a number of medical expenses submitted by the Applicant could be considered as directly related to the service-incurred injury to his right eye and reasonable for the treatments/services provided. In her reply of 29 July 1997, the Medical Director informed the ABCC that with respect to bills related to the treatment of the left eye, "[W]e would like the Board to decide whether to approve this bill or not. The illness

of the left eye is not related to [the Applicant's] performance of duties on behalf of the Organization. However, since [the Applicant] has lost his vision from the right eye, the Board might consider that optimising the left eye vision could be considered as acceptable medical expense."

Following a recommendation of the ABCC, on 22 August 1997, at its 381st meeting, the Secretary-General decided, 8 September 1997, "[t]hat all medical expenses certified by the Medical Director as reasonable and directly related to the claimant's illness (loss of vision in right eye) be reimbursed". The Applicant was so informed on 6 October 1997.

The ABCC reconsidered the case again at its resumed 381st meeting on 10 October 1997. On 6 November 1997, the Secretary-General adopted the following recommendation of the ABCC, namely to uphold the determination of the Medical Director, as contained in her memoranda of 10 October 1996 and 7 March 1997, and to reimburse the Applicant for air tickets and hotel accommodations only upon confirmation from the Joint Medical Service, United Nations Office at Geneva (UNOG), (JMS) that it had recommended that the Applicant obtain medical treatment in London. On 17 November 1997, the Secretary, ABCC, informed the Applicant of the decision of the Secretary-General and also that the JMS had advised that it had not recommended a medical evacuation to London. In light of this information, no reimbursement could be made for the air tickets Geneva-London-Geneva or for hotel accommodations.

On 18 March 1998, the Secretary, ABCC, asked the Medical Director to review additional documentation provided by the Applicant, who maintained that "his travel and stay for treatment in Cambridge were "recommended in full agreement with the Director of the JMS" and to determine whether any of those medical expenses could be reimbursed and whether her previous determination on this matter remained unchanged. In her reply of 28 April 1998, the Medical Director informed the ABCC that the Applicant had not proven that his treatment in the United Kingdom and France had been recommended by the JMS, and that her earlier decisions stood. The Applicant was so advised on 21 May 1998.

On 15 December 1998, at its 388th meeting, the ABCC recommended to the Secretary-General, and; on 17 December 1998, the Secretary-General adopted the recommendation of the ABCC, as follows:

> "... (b) as regards the right eye, that the compensation equivalent to a twenty-four (24) per cent permanent loss of function of the whole person remains unchanged;
>
> ...
>
> (ii) that the claimant be reimbursed for those medical and related expenses which have been certified by the Medical Director as reasonable and directly related to the service-incurred injury, and for which the required supporting documentation has been provided, in the currency and amount in which the expense was incurred, but that no interest shall be paid on any such amounts; ..."

On 18 February 1999, at its 389th meeting, the ABCC recommended to the Secretary-General, and the Secretary-General decided, on 21 February 1999, as follows:

> "(i) in regard to the reimbursement of medical expenses for which no supporting documentation has been provided, those expenses which have been certified by the Medical Director as directly related to the loss of vision of the right eye and as reasonable for the treatments/services provided, may be reimbursed, on an exceptional basis, subject to confirmation of the following: (a) that the surgeries where performed as stated by the claimant; and (b) that the claimant was hospitalised at the Clinique Générale de Genève and that the amount of CHF 9,000 is reasonable for the length of the hospitalisation and for the treatments received; and that payment may be effected only upon approval by the Controller;
>
> (ii) [the ABCC's] previous recommendations that only those medical and related expenses which have been certified by the Medical Director as being directly related to the service-incurred injury to the right eye and reasonable for the treatments/services provided may be reimbursed, be upheld; and
>
> (iii) based on the documentation provided by the claimant and on the report of the Medical Director, those expenses related to travel, hotel and living costs incurred as a result of treatment in the United Kingdom may not be reimbursed, as the [JMS] had not expressly recommended that the claimant obtain medical treatment in London."

On 28 May 1999, and in connection with the Secretary-General's decision of 21 February 1999, the Secretary, ABCC, wrote to the Officer-in-Charge (OiC) of Compensation Claims, UNOG, with a copy to the Applicant, informing him of the decision of the Secretary-General, and asking him to seek additional information in connection with the Applicant's undocumented medical claims, with a view to implementing such decision. On 11 June 1999, the Applicant sent additional information.

In his reply of 5 July 1999, the Officer-in-Charge of Compensation Claims provided all additional information that he was able to obtain in connection with the undocumented claims presented by the Applicant, including information that a bill from one of the doctors had never been paid by the Applicant. On 30 July 1999, the Applicant objected to the "enquiry" by the Officer-in-Charge.

On 26 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. When the service incurred injury to the Applicant's right eye was at long last recognized as attributable to the performance of official duties, the left eye, which was affected as early as March 1983 became completely ill and impairment was 80%. The decision to maintain the impairment of the whole person to be 24% is most inappropriate and violates his rights.

2. The non-payment of all outstanding medical bills as recommended by the ABCC violates the Applicant's rights.

Whereas the Respondent's principal contentions are:

1. The Applicant's request for greater compensation under Article 11 of Appendix D should be denied: proper procedures were followed in determining the percentage of loss of function; the Applicant is estopped from asserting that his other eye was affected; illnesses arising subsequent to the service-incurred injury should not figure in the percentage of loss of function equation.

2. The Secretary-General's decision in this case was properly made and his acceptance of the ABCC recommendations was a reasonable exercise of his discretion. A challenge to the award of compensation based upon a medical determination of a 24 per cent loss of function of the whole person should have been submitted by the Applicant to a medical board pursuant to Article 17 of Appendix D, in the absence of which it is not receivable. If receivable, the matter would be time-barred.

3. There is no basis on which to award the requested payment of undocumented medical and related bills, including the cost of travel to London, England.

4. The Secretary-General's decision in this case was not tainted by improper motive, abuse of discretion or other extraneous factors.

The Tribunal, having deliberated from 28 October to 18 November 2003, now pronounces the following Judgement:

I. This Application arises out of a decision by the ABCC to award the Applicant compensation for an alleged service incurred injury to his right eye. The Application contains two separate pleas. The first contests the decision of the Secretary-General, adopting the recommendation of the ABCC, that the Applicant be awarded compensation based upon a determination of a twenty four percent (24%) loss of function of the whole person, pursuant to Appendix D to the Staff Rules. The second challenges the Secretary-General's decision, again adopting the ABCC's recommendation, to reimburse the Applicant only for those medical expenses and costs that were certified by the Medical Director as being documented and directly related to his injury.

II. The Respondent alleges, inter alia, that the Application is time-barred and not receivable.

III. The Tribunal, before it may address the merits of the Applicant's claims, must first determine whether his claims are time-barred or not receivable. In relevant part, article 7(4) of the Statute of the Administrative Tribunal provides that:

> "An application shall not be receivable unless it is filed within ninety days ... reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the Applicant."

Article 7(5) further provides that:

> "In any particular case, the Tribunal may decide to suspend the provisions regarding time limits."

The Secretary-General's initial decision on the Applicant's loss of function, following a remand of the issue from the Tribunal to the ABCC, was issued on 13 May 1996. After numerous reconsiderations by the ABCC regarding the degree of the Applicant's loss of function and regarding the Applicant's claims for medical expenses allegedly attributable to his service-incurred injury, the Secretary-General's ultimate decision regarding the Applicant's claim for loss of function was issued on 17

December 1998 and for reimbursement of medical expenses on 21 February 1999. Subsequently, the Applicant and the OiC of Compensation Claims, UNOG, engaged in correspondence and an exchange of documents and information, all relating to the Applicant's claim for reimbursement of medical expenses for which reimbursement had been denied by the Secretary-General's decision on 21 February 1999. The last communication in the record from either the Respondent or the Applicant, relating to the Applicant's claims for reimbursement was on 30 July 1999 when the Applicant objected to the enquiry by the OiC.

IV. Applying the most favorable reading to the Applicant's facts, the Tribunal finds that the Applicant first submitted his Application on 18 May 2000, some fifteen months after the Secretary-General's final decision regarding his claims, over eight months from the last communication with the Respondent regarding his claims for medical expense reimbursement and well beyond the required filing time limits of ninety days set forth in Article 7(4) of the Tribunal Statute. Although the Tribunal has authority to extend its time limits in exceptional circumstances (see Judgement No. 715, *Thiam*, (1995)), the Tribunal has previously recognized the importance of adhering to time limits. (See Judgements No. 359, *Gbikpi* (1985); No. 1094, *Al-Hafiz* (2003).) The Applicant has failed to demonstrate any exceptional circumstances that might form the basis for extension in this case. The Applicant is well aware of the time limits for filing, because that issue was raised and addressed by the Tribunal in Judgment No. 715. In that decision, the Tribunal granted a waiver of the time limits to the Applicant for humanitarian reasons, "in view of the progression of the disease from which he suffered". At the time, the Applicant had alleged that he was unable to prepare and submit his case, because of his eye disease. Although the Tribunal recognizes that the Applicant continues to suffer from a loss of vision, it is not convinced that his condition is so immediately precarious or acute that he was unable to file his Application in a timely fashion. The Tribunal notes that even after the Secretary-General's last decision, the Applicant was engaged in extensive communication with the ABCC and the OiC of Compensation Claims, UNOG, including writing letters, submitting expenses and relevant documentation relating to expenses, and making arguments in support of his claims. The Tribunal finds no evidence that the Applicant was precluded by his condition from filing his Application in a timely fashion, and absolutely no evidence explaining or justifying a delay of more than one year in submitting his claims to the Tribunal.

V. The Tribunal notes that the Applicant's case is a perfect example of why time limits exist, and why, barring exceptional circumstances, they are not to be extended. With respect to the Applicant's claims for reimbursement of medical expenses, the Applicant makes claims for expenses that are, in some cases, more than ten years old. With respect to some of those expenses, the Applicant is unable to provide evidence of having incurred them, because too much time has elapsed. In at least two instances where the Applicant sought to obtain duplicate records to demonstrate those expenses, the record holders explained that they were unable to provide such duplicates, having previously destroyed their records, due to the great length of time that had elapsed since service was provided to the Applicant. In one case, the record holder was only required to maintain its records for ten years. Without addressing the substance of the Applicant's allegations, the Tribunal is satisfied that the Applicant himself sees first-hand the importance of meeting time limits. The Tribunal finds that the Applicant's claims are time-barred.

VI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(*Signatures*)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1156

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1156

Case No. 1255: FEDORCHENKO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Alexander Fedorchenko, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 2001 and twice thereafter until 30 April 2002;

Whereas, on 30 April 2002, the Applicant filed an Application, requesting the Tribunal, inter alia:

> "...
>
> ... [to] take into account the cumulative number of irregularities and abuse, and order the Respondent to pay the Applicant ***additional*** compensation and damages equivalent to ***twelve months*** of net base salary at the rate in effect on 1 December 1998."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 August 2002 and periodically thereafter until 31 May 2003;

Whereas the Respondent filed his Answer on 30 May 2003;

Whereas the Applicant filed Written Observations on 10 July 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a fixed-term appointment on secondment basis for a period of five years, as an Associate Translator at the P-2 level with the Russian Service, Translation Division, Department of Conference Services (DCS), on 3 November 1978 and was promoted to the P-3 level, effective 1 November 1980. The Applicant resigned from the Organization on 5 November 1982. On 5 April 1986, the Applicant was re-appointed on a fixed-term secondment basis for a period of two years, as a Translator at the P-4 level with DCS and, effective 8 September, he was reassigned to the Editorial and Official Records Division, DCS, as an Editor. The Applicant's appointment was subsequently extended several times until 1 December 1991, when he was granted a permanent appointment.

On 2 April 1992, the Applicant, responding to a list of vacancies and posts likely to become vacant by the end of 1992, expressed his interest in the P-5 level post of Chief, Official Records Editing Section (ORES), United Nations Office at Geneva (UNOG). The job description for the P-5 post indicated as a minimum requirement, inter alia,

> "university education, with preferably a graduate degree in languages and substantial previous relevant experience with documentation. ... At least 10 years experience as an editor of which 5 years with the United Nations; ... Excellent command of English, French and at least one other official language of the United Nations."

On 11 March 1993, the Applicant, having not received any information concerning his application, inquired with the Office of Human Resources Management (OHRM) as to the "current situation" of the P-5 post. On 17 March, the Applicant was informed that his name, along with other candidates, had been recommended for the post.

On 22 May 1995, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting information on the status of the post while noting that three years had elapsed since the vacancy announcement was issued.

On 26 May 1995, a vacancy announcement for the same P-5 post of Chief, ORES, UNOG, was issued, with a notation that its functions "are currently being discharged by a staff member on a temporary basis." The announcement did not indicate the competencies and skills required to fill the post.

On 16 March 1998, another vacancy announcement for the same post was issued, listing under "competencies and skills", the following requirements:

> "Advanced university degree or equivalent qualification from a university or institution of equivalent status and substantial previous relevant experience with documentation. Thorough knowledge of the United Nations, its whole range of activities and its documentation. Knowledge of international affairs and extensive years of experience as an editor, of which five years should be within the United Nations. Excellent command of English, French, and at least one other United Nations official language; demonstrated proficiency in other official languages highly desirable. **Must have passed the United Nations Editor's Competitive Examination**."

On 16 April 1998, the Applicant wrote to the Assistant Secretary-General, OHRM. While noting that he had applied for the post for a third time, he stated that the rules regarding promotions had not been respected and expressed his concern that this would happen again. He further pointed out the fact that the post had been advertised as vacant, yet another staff member, who also applied for the post, had been assigned against this "frozen" post, giving her an unfair advantage in the promotion process. On 14 October the Applicant again wrote to the Assistant Secretary-General, OHRM, drawing her attention to the fact that the post had still not been filled and was still encumbered by the other candidate.

On 16 November 1998, the Applicant was notified that the Department had recommended another candidate to the post and, on 25 November, the Applicant submitted additional information to the Appointment and Promotion Board (APB). On 3 December, the APB recommended the other candidate to the post. In its report to the Secretary-General, the APB stated that

> "... In endorsing the Department's recommendation, the Board did not take into account the reference made by the Departmental Panel to the fact that [the other candidate] had acted as Officer-in-Charge of the Section since this would be tantamount to giving unfair advantage to her candidacy. The Board made its recommendation on the basis of other criteria, in particular [the other candidate's] longer experience in editing and her broader range of languages."

On 28 December 1998, the Under-Secretary-General for Management, on behalf of the Secretary-General, approved the promotion of the other candidate to the post and, on 5 January 1999, the Applicant was informed of same.

On 8 February 1999, the Applicant requested the Secretary-General to review the administrative decision to appoint the other candidate to the post.

On 8 April 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 31 July 2001. Its conclusions and recommendation read, in part, as follows:

> "***Conclusions and Recommendation***
>
> 35. ... the Panel *unanimously agreed* that it had no statutory competence to review the Appellant's claim of his superiority to [the other candidate] in terms of relative efficiency and performance.
>
> 36. The Panel also *unanimously agreed* that the Secretary-General's discretionary authority in promotion matters had been abused in the present case, because the promotion exercise for the P-5 post of Chief of Section, ORES/UNOG, had been delayed for more than six and half years apparently without legitimate organizational or administrative reasons, and that the unreasonable delay hurt the fundamental need of the Organization to fill the P-5 post within a reasonable time and frustrated the reasonable expectation of the Appellant to see the Administration proceed with the promotion exercise with due diligence and in good faith.
>
> 37. The Panel thus *unanimously recommends* that the Appellant be paid three-month net base salary in effect in December 1998 in compensation for the damages caused by the undue delay in the promotion exercise.
>
> ..."

On 7 December 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusions and, in accordance with its recommendation, to compensate the Applicant in the amount of three months net base salary.

On 30 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB, having determined that the Secretary-General's discretionary authority in promotion matters had been abused and having determined that there were procedural irregularities in the promotion process, failed to take into full account the circumstances of the case, the seriousness of the irregularities and their impact on the career development of the Applicant.

2. The processes and procedures for filling the post, to which the Applicant had applied on three occasions over the six-year period, were flawed, thereby denying the Applicant his right to receive full and fair consideration.

3. The criteria for awarding a compensation of only three months net base salary were arbitrary. The amount was disproportionate with the seriousness of the irregularities, abuse and delay and was inadequate considering that the abuse of administrative power cannot be corrected otherwise.

Whereas the Respondent's principal contentions are:

1. The length of the promotion exercise did not violate any of the Applicant's rights. The Applicant has no right to promotion only to being fully considered for a promotion.

2. The Applicant was fully compensated for the length of the promotion exercise. No additional compensation is warranted.

The Tribunal, having deliberated from 29 October to 19 November 2003, now pronounces the following Judgement:

I. The Applicant entered the service of the United Nations in 1978 and worked, on secondment, as a Translator, until 1982, when he resigned. In 1986, the Applicant re-entered the service of the Organization, on a fixed-term secondment basis, as a Translator at the P-4 level, in DCS until, on 1 December 1991, he was granted a permanent appointment.

On 16 March 1992, a list of vacancies was circulated, as well as a list of posts likely to become vacant by the end of 1992. The Applicant expressed his interest in the P-5 post of Chief of Section, Official Records Editing Section, UNOG. Not having received any information regarding the status of the post, in March 1993 and again in May 1995, the Applicant inquired as to the outcome of the recruitment process with regard to the post. A few days after his May inquiry, a new vacancy announcement for the same post was issued, indicating that the functions of the post were currently being discharged by a staff member on a temporary basis. Ultimately, the incumbent was recommended to fill the post but withdrew her candidacy and the post remained vacant. Subsequently, the post was "frozen" for the biennium 1996/1997.

On 16 March 1998, a third vacancy announcement for the post was issued. This time, the Administration decided to rewrite the vacancy announcement, amending the qualification requirements. The Applicant applied again and, in November 1998, he was informed that the Department had recommended another candidate for the post.

In December 1998, the APB endorsed the Department's recommendation, stating that their decision was based on criteria such as the selected candidate's experience in editing and her broader range of languages, and emphasizing that the reference made by the Department to the fact that the selected candidate had served as Officer-in-Charge of the Section, was not taken into account. The APB explained that, taking such a criterion into consideration would be unfair to any other applicant who had not had that opportunity.

On 8 April 1999, the Applicant lodged his appeal with the JAB. The JAB concluded that it did not have the competence to review the merits of the candidates or to establish the Applicant's superiority over them. The JAB, however, found that there was undue delay of more than six-and-half years in the promotion exercise for this post and therefore recommended that the Applicant be granted three months net base salary as compensation. The Secretary-General decided to accept this recommendation and this Application followed.

II. The Tribunal concurs with the JAB that it is not possible to revise the substantive decision taken, according to which the other candidate was promoted to the P-5 post; to do so would be usurping the Secretary-General's discretion in promotion proceedings. The Tribunal recalls that it has been its long standing jurisprudence that in scrutinizing promotion cases, the Tribunal will restrict itself to examining whether the decision was tainted by any element of arbitrariness. The Tribunal recently reaffirmed this position in its Judgement No. 1085, *Wu* (2002):

> "As often stated by the Tribunal, a staff member has only the right to a fair consideration for promotion but has no right to a promotion. Yet, it also goes without saying that the consideration must be fair and untainted by procedural irregularities, lack of due process, prejudice or discrimination. When the Respondent properly exercises his discretion regarding a promotion, the Tribunal will not interfere with the decision made. (See Judgement No. 1056, *Katz* (2002).)"

The Tribunal notes that in making its recommendation, the APB did not take into consideration the fact that the selected candidate was filling the post as the Officer-in-Charge. The Tribunal does not find that the selection decision was tainted by improper factors.

The Tribunal also concurs with the JAB's other conclusion, that in filling the post, the Administration did not follow proper procedures. In the Tribunal's view, this

was not only because the process lasted six-and-half years, which was the only procedural violation determined by the JAB, but also based on an examination of the entire selection process for the post, part of which was the subject of Judgement No. 974, *Robbins* (2000). In *Robbins*, the Tribunal determined that there were procedural irregularities in connection with the first two vacancy announcements for the post, and determined that "[the] lapse of over two years without a published result in the promotion process constitutes undue delay and unfair treatment."

In the present Application, the vacancy of the post was announced, the years passed and in order to obtain any information as to the outcome of the selection process the Applicant had to repeatedly request it. He received no formal response regarding the first selection procedure and the reasons why he was not selected; the vacancy announcement was re-issued and subsequently, the requirements of the post changed before yet another vacancy announcement was issued (inexplicably accepting an alternative to the requirement of a university education and degree); and, finally, the person encumbering the post for a number of years as Officer-in Charge, even though the post was apparently "frozen", got the promotion to the post. This procedure can not be acceptable, even when taking into consideration that the APB eliminated from the selection criteria the fact that the successful candidate had the experience of being the temporary incumbent of the post.

The Tribunal has repeatedly expressed its dissatisfaction with practices followed by the Administration which lead to procedural irregularities in the selection process, even when ultimately the Tribunal refrained from intervening in the substantive decision. (See Judgements No. 1087, *El-Charaoui* (2002); and, No. 1122, *Lopes Braga* (2003).)

It is the Tribunal's view that procedures, especially in matters where the Organization's employees' career and personal work satisfaction are involved, must be thoroughly respected in order to avoid injury - substantive or moral - to its staff members. Decisions ought to be taken in a timely manner and with the necessary care, so as not to create any suspicion that procedures are tailor made.

In light of all the above, the Tribunal finds that greater compensation than has been awarded by the Respondent to the Applicant would be more appropriate.

III. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to seven months net base salary at the rate in effect on the date of this Judgement, in addition to the compensation already paid to him;

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Second Vice-President

Spyridon **Flogaitis**
Member

New York, 19 November 2003

Maritza **Struyvenberg**
Executive Secretary

United Nations AT/DEC/1157

# Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1157

Case No. 1247: ANDRONOV Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Mayer Gabay, Vice-President; Mr. Spyridon Flogaitis, Member;

Whereas at the request of Evgueni Andronov, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 11 February 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

... **the Applicant respectfully requests the Tribunal to**:

1. Rescind the decision of the Secretary-General to accept the recommendation of the Joint Appeals Board [(JAB)].

...

3. Recommend [to] the Secretary-General to undertake an administrative investigation with a view to establishing responsibilities of the [United Nations Office at Geneva (UNOG)] Administration officials who, by abusing power and authority ... have involved the Organization in the Applicant's private and family affairs ... and who defamed and harassed the Applicant for more than five years.

**The Applicant respectfully further requests the Tribunal to order the Secretary-General:**

4. To award the Applicant the sum of ... (USD $100,000) as compensation for the actual and consequential damages he has suffered as a result of the Administration's illegal interference into his private family affairs ...

5. To award the Applicant the sum of ... (USD $500,000) as compensation for the actual, consequential and moral damages ... he has suffered as a result of his continued and systematic harassing treatment by the Administration ...

6. To award the Applicant the sum of ... (USD $500,000) for the moral injury and damages to his reputation as a result of the defamation and illegal placing of adverse material by the Administration into his Official Status File; and for the consequential damage to his career development;

7. To add interest (at the rate of six percent per annum) to any and all of the above amounts ... from ... (18 May 2000) through the date any amounts awarded hereunder are finally and fully paid to the Applicant;

8. To award the Applicant the sum of ... (USD $30,000) in respect of expert and legal fees, and other costs ...

9. To award such other relief as the Tribunal deems just, fair and equitable ...

10. The Applicant ... also respectfully requests the Tribunal to invoke Financial Rule 114.1 and Staff Rule 112.3 so that ... officials be held accountable for their actions and decisions which they knew were contrary to [United Nations] policies and established practices, and so that the amount of the compensation paid to the Applicant may eventually be recovered from those officials."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 July 2002;

Whereas the Respondent filed his Answer on 31 July 2002;

Whereas the Applicant filed Written Observations on 31 January 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a one-month short-term appointment as a Translator with the United Nations Office at Geneva (UNOG), on 30 August 1968, and was subsequently granted a five-year fixed-term appointment. Following a lengthy break in service, on 9 January 1983, the Applicant was re-appointed on a fixed-term secondment basis for a period of two years as a Senior Research Officer at the P-5 level, with the Joint Inspection Unit. This appointment was renewed several times

until 1 December 1991, when the Applicant was granted a permanent appointment. The Applicant separated from service upon retirement on 30 April 2001.

On 20 October 1994, the Applicant filed for divorce in the Nikoulinsky Tribunal, Russian Federation. On 6 December, he informed the Legal Adviser, UNOG, of same and of the fact that his spouse had filed for divorce before the "Tribunal de Première Instance" in Geneva. On 15 February 1995, the Nikoulinsky Tribunal pronounced the Applicant's divorce and, on 7 March, the Applicant transmitted to the UNOG Administration a copy of the court's decision, adding that since no appeal had been filed, the decision became final and binding on 27 February. On 14 March, a Personnel Action form was issued, changing the Applicant's status to "divorced" and ending his entitlement to salary and post adjustment at dependency rate.

The same day, 14 March 1995, the Acting Chief, Personnel Service, UNOG, forwarded to the Applicant a copy of a letter sent by his former spouse whereby she claimed that she had received no financial support from him since October 1994. The Acting Chief stated that, while the Organization does not normally intervene in private family matters, failure to honour legally binding family support obligations violated the standard of conduct required of international civil servants. Additionally, the Applicant was requested to provide evidence that the sum paid to him at the dependency rate was being used for its declared purpose. Subsequently, the Applicant responded, confirming, inter alia, that he had been transferring the dependency allowance paid to him by the Organization to his former spouse's bank account.

On 30 March 1995, the Moscow City Tribunal rejected an appeal from the Applicant's ex-wife against the divorce decision and, on 14 April, the divorce became final and binding.

On 18 April 1995, in response to a request by the Senior Legal Adviser, UNOG, the Applicant transmitted a copy and an unofficial translation of the Certificate of Dissolution of Marriage and, on 2 June, the Applicant requested that his former spouse's "carte de légitimation" be cancelled. The Applicant reiterated this request on 19 June.

On 26 July 1995, the Applicant submitted a copy of an official translation of the Certificate of Dissolution of Marriage and, on 31 July, he brought to the attention of the Personnel Service, UNOG, the relevant article of the Russian law, which states that "the marriage is considered terminated at the time that the divorce is recorded in the Register of the Acts of Civil Status". The conditions having been met, the

Applicant again requested the Administration to "bring this matter to a close without further delay".

On 26 September, the Senior Legal Adviser, advised the Chief, Strategic Planning for Human Resources Management, UNOG, that:

> "The documentation provided by [the Applicant] clearly indicates that he has been legally divorced by a competent Russian Court ... as far as the legal consequences for alimony and matrimonial property are concerned, I advised [the Applicant's former spouse] that she might wish to obtain a decision from a Swiss Court, since the Moscow Court decision remains silent on these questions ... I would recommend that the Administration draws the attention of the [Applicant], in writing, to his legal and financial obligations towards his former wife, as contained in Administrative Instruction ST/AI/399 of 14 December 1994."

On 24 November 1995, the Acting Chief, Personnel Service, UNOG, informed the Applicant that the "cancellation list concerning the 'carte de légitimation' of [his] ex-spouse was sent ... to the Swiss Permanent Mission in Geneva."

On 29 March 1996, the Applicant submitted a decision rendered by the *Tribunal de Grande Instance* de Thonon-les-Bains (France) dated 25 January 1996, confirming the validity of the divorce pronounced by the Nikoulinsky Court. The Applicant again urged the Administration to collect the "carte de légitimation" of his former spouse.

On 7 May 1996, the Senior Legal Adviser, informed the Applicant that legal action was initiated by his former spouse before a Swiss Court.

On 10 March 1997, the Senior Legal Officer advised Human Resources Management that as the divorce sentence issued by a Moscow court in March 1995 did not address the question of alimony, it was reasonable to expect that the Applicant might have to pay to his ex-wife a portion of his earnings.

On 20 January 1998, in response to a letter from the Applicant's former spouse, the Assistant-Secretary-General for Human Resources Management stated that

> "while private family matters are not in themselves the business of the Organization, staff members are expected to comply with their legal obligations towards former spouses and dependants. Whenever such obligations are not met, the United Nations will request the staff members to comply with the relevant court order issued in such cases".

On 13 November 1998, the Geneva appeals court overturned the 23 October 1997 decision of the *Tribunal de Première Instance* of Geneva, thereby rejecting the claims of the Applicant's former spouse.

On 6 July the Applicant responded to a request from the Senior Legal Adviser, to provide evidence of the financial support to his former spouse, concluding that the statements made by the Senior Legal Adviser amounted to harassment. The same day, the Chief, Personnel Service, wrote to the Applicant informing him that, having considered the documents submitted by him in relation to his divorce, the Administration considered the case closed. Subsequently, on 8 July, she informed the Senior Legal Adviser that further involvement of the Administration in this case would be inappropriate.

On 13 July 1999, the Applicant was again assured that the case was closed.

On 6 and 21 March 2000, the Applicant requested copies of several documents contained in his Official Status File. He received the requested documents on 24 March.

On 18 May 2000, the Applicant requested the Secretary-General's agreement to bring his appeal directly to the United Nations Administrative Tribunal and, on 5 July he was informed that his request was denied.

On 25 July 2000, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 20 July 2001. Its considerations, conclusion and recommendation read, in part, as follows:

> "**Considerations**
>
> *Receivability*
>
> ...
>
> 65. ... the Panel recalled that although there is no 'official definition' of the term 'administrative decision', it can be defined within the meaning of Staff Regulation 11.1 as 'a decision by the Administration concerning a staff member's terms of appointment, including all pertinent regulations and rules'.
>
> 66. Hence, in the absence of jurisprudence, the Panel first called to mind that the doctrine defined the 'administrative decision' as a juridical act adopted unilaterally by the Administration and affecting staff members' terms of appointment.
>
> 67. ... the Panel found no administrative decision as defined above. It noticed that the alleged administrative decisions against which the Appellant complained consist of a series of communications sent by the Administration either to inform the Appellant or other concerned staff members, or to ask the Appellant for comments or clarifications. ...

68. Moreover, the Panel found no violation of the Appellant's terms of appointment in the documents and memoranda provided with the Statement of Appeal. The matters brought to the fore by the Appellant are mainly related to private concerns and as such did not have any influence whatsoever on the Appellant's career.

...

**Conclusion and Recommendation**

70. ... the Panel concludes that the appeal is **not admissible** for the reason that the constitutive element for an appeal to be receivable is lacking: there is no administrative decision that the Appellant could have contested.

71. ... the Panel finds that there is no valid basis for entering further into the merits of the case.

72. Consequently, the Panel unanimously **recommends** to the Secretary-General to reject the present appeal."

On 9 November 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's conclusions and had decided to take no further action on his appeal.

On 11 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in determining that there was no administrative decision contested. In fact, there was a series of consequential decisions taken by the UNOG Administration, which violated the Applicant's rights.

2. The Applicant suffered from the Administration's abuse of power and authority; interference in his private affairs, including judicial proceedings before national courts; continued and systematic harassment; defamation; and, placing of adverse material in his Official Status file, thereby damaging his reputation and career development.

3. The Administration violated the Applicant's terms of appointment provided for under the Staff Regulations and Rules and various administrative issuances.

4. The Administration delayed cancellation of the Applicant's former spouse's "*carte de légitimation*".

Whereas the Respondent's principal contentions are:

1. There is no administrative decision in contest. The Administration's actions were reasonable in the circumstances, and did not constitute harassment.

2. Even if the subject matter of the present Application came within the competence of the Tribunal, it would not be timely filed.

3. The actions complained of were not prompted by bias, improper motivations, or other extraneous factors on the part of the Administration.

The Tribunal, having deliberated from 23 October to 20 November 2003, now pronounces the following Judgement:

I. In October 1994, the Applicant, a Russian national who was at the time married to another Russian national, filed for divorce in the competent court in the Russian Federation. It appears that, during these proceedings, the Applicant's wife was represented by an attorney. In February 1995, the divorce was pronounced and a few days later the Applicant transmitted the decision to the Administration. Accordingly, effective 27 February, the Respondent amended the Applicant's marital status to "divorced" and discontinued the Applicant's entitlement to salary and post adjustment at the dependency rate. The Applicant's wife appealed against the divorce decision, which appeal was considered and rejected by the Moscow City Tribunal on 30 March. The divorce became final and binding, in accordance with the relevant Russian law, upon its registration in the "Register of the Acts of Civil Status", on 14 April.

II. According to the Applicant, a series of problems with the Administration ensued. First, he was required by the Administration to provide evidence to rebut his ex-wife's accusations that he had not been supporting her since the legal proceedings began, despite having received payments from the Organization at the dependency rate; then the Applicant had to repeatedly request that his ex-spouse's "carte de legitimation" be cancelled; in July 1995, the Chief, Strategic Planning for Human Resources Management, started investigating, with the assistance of the Senior Legal Adviser, the validity of the Russian judgement and its consequences, particularly as they concerned the Applicant's financial responsibilities towards his ex-wife; subsequently, on the advise of the Administration, the Applicant's ex-wife brought before the Geneva courts her case for alimony, and when she won in the Court of the First Instance, the Assistant-Secretary-General for Human Resources Management rushed to remind the Applicant of his obligations to his ex-wife, notwithstanding that,

on appeal, this judgement was reversed, with the final result being that the Russian decision was final and binding; additionally, the Applicant was not informed of adverse material which was placed in his official status file; and, finally, informal legal advise was repeatedly given to his ex-wife by the Administration.

The Applicant maintains that, in all of the above mentioned instances, the Administration failed to comply with its own policies.

Having felt that he had been subjected, since 1995, to mistreatment, as briefly described above, on 18 May 2000, the Applicant requested the Secretary-General's agreement to bring his case by way of direct submission to the Tribunal. The Applicant thought that this was the appropriate procedure, as his appeal would raise legal issues related to the basic rights and obligations of staff. The Applicant further stated his belief that his case did not fall within the competence of the JAB, since there was no administrative decision *per se* to appeal against, but at the same time, it was within the competence of the Tribunal, since the issues raised dealt with non-observance of a staff member's terms of appointment.

On 5 July 2000, the Applicant was informed that his request had been denied by the Respondent, and that, "only appeals that raise solely issues of law should be submitted directly to the Tribunal".

Following the denial of his request, the Applicant lodged an appeal with the JAB, contesting a series of failures and non-observance of his terms of appointment by the UNOG Administration. The JAB determined that the appeal was not admissible *ratione materiae* as, according to the JAB, there was no administrative decision that the Applicant could have challenged in the proceedings before it. The JAB therefore recommended that the Secretary-General reject the appeal and the Secretary-General decided to accept the JAB's recommendation. This is the decision contested in the present Application before the Tribunal.

III. Article 2.1 of the Statute of the Administrative Tribunal of the United Nations, states that:

> "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

Article 7.1 of the Statute states that:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

Finally, under staff rule 111.2(a)

> "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

In view of the above and taking into account the facts of the case, the Tribunal has to address the issue of receivability of the present Application.

IV. The Respondent contends that the Tribunal has no jurisdiction over this case, since, without his consent, a case cannot be submitted directly to the Tribunal, and such consent was not given in the present case; at the same time, the case could not be brought to the Tribunal via the JAB proceedings, because no matter what alleged injury the Administration caused the Applicant, there is no specific administrative decision to challenge. The Respondent fails, however, to answer the question, how an employee's legal rights against the Administration would be protected under these stipulations. The Respondent seems to indicate that there is a *lacuna* in the legal system of the United Nations, but fails to suggest how this *lacuna* would be filled.

The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

Consequently, the Tribunal determines that, in cases where the Administration believes that there is no specific administrative decision to be challenged in proceedings before the JAB, the rules should be interpreted by the Administration so as to ensure that legal and judicial protection are provided.

V. Having stated the above, the Tribunal does not find it necessary to pursue this course as, in the present case, there were administrative decisions challenged by the Applicant, even if he initially thought that there were no administrative decisions *per se*.

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions. The Tribunal notes in this context its Judgement No. 916, *Douaji* (1999), where the Applicant contested the "non-extension [to her] of priority for re-employment and/or reinstatement ...". In that case the Tribunal determined that "[t]he 'administrative decision' that [the Applicant] sought to challenge, ... was the Secretary-General's failure to take appropriate measures ..."

In the present case, the file contains many such implied administrative decisions in the failures and non-observance of terms of employment, as cited by the Applicant. For example, the decision not to cancel, for an unreasonably long period of time, the ex-wife's "carte de legitimation", or the decision to provide the Applicant's ex-wife with legal advise on how to utilize the judicial system to her benefit, in her marital dispute with the Applicant. Moreover, the Tribunal accepts the Applicant's contention that documents placed in his official status file contained language which reflected adversely on his character, reputation and conduct and as such constitute "adverse material" as referred to in administrative instruction ST/AI/292 of 15 July 1982. In accordance with this Administrative Instruction, such material "may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon". Placing such documents in the Applicant's file without

showing it to him and obtaining his comments, constitutes another challengeable administrative decision. However, as the Respondent also concedes, for the Tribunal to obtain jurisdiction over a case, it is sufficient for an Applicant to contest a single administrative decision.

VI. The Respondent contends that even if the Tribunal accepts that there was an appealable administrative decision, the Applicant failed to challenge this decision in a timely manner. The Tribunal rejects this contention. As stated in previous jurisprudence, the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant. Staff rule 111.2(a) indicates, procedurally, the point in time from which the counting towards the deadline begins for initiating an appeal process. However, if a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision. This is particularly so in cases of implied administrative decisions, as otherwise the right to legal and judicial protection could easily be jeopardized. In Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal, stated:

> "... another possible and ... more realistic starting point would be the point at which the Applicant became aware that her situation was unsatisfactory ... The Tribunal recalls in this regard its jurisprudence in Judgements No. 549, *Renninger* (1992), para. VI, and No. 596, *Douville* (1993), para. IX, in which 'the Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim' (see also Judgement No. 527, *Han* (1991))."

The Applicant became aware of the adverse material in his file only upon reviewing it in March 2000, following which and having received copies of these documents, in May 2000, he requested the Secretary-General to review his case and to agree to direct submission to the Tribunal. The Applicant initiated the appeal process within the prescribed time-limits. The Tribunal also notes that upon reviewing his Official Status file in the context of the current proceedings before the Tribunal, the Applicant discovered additional documents which the Administration failed to bring to his attention, though it should have done so.

VII. The Tribunal, however, wishes to take this opportunity to point out that, in its jurisprudence, the Tribunal has practically dissociated its decisions on the issue of damages from its position concerning the challenged administrative decision. The

Tribunal may thus find, for example, that a contested decision is legally sound, or that it is not tainted by arbitrariness, yet at the same time decide to award damages for reasons which are completely independent from the legality of the administrative decision in question, for example as compensation for undue delays. (See Judgment No. 1104, *Tang* (2003).)

VIII. Finally, the Tribunal does not find it necessary to remand this case to the JAB, as the file contains sufficient written documentation to support and substantiate the Applicant's claims. Specifically, there is ample written proof that the Administration interfered in the Applicant's personal affairs and in so doing violated its obligation not to get involved in the private maters of its employees. Examples of this interference can be found in the 26 September 1995 memorandum from the Senior Legal Officer to the Chief, Strategic Planning for Human Resources Management, whereby he states, inter alia, "as far as the legal consequences for alimony and matrimonial property are concerned, I advised [the Applicant's ex-wife] that she might wish to obtain a decision from a Swiss Court ..."; in the 10 March 1997 memorandum from the Senior Legal Officer to the Chief, Strategic Planning for Human Resources Management, whereby he states, inter alia, "the divorce sentence issued by a Moscow court in March 1995 does not address the question of the distribution of matrimonial property nor the question of alimony ... By all standards, it is reasonable to expect that [the Applicant] will in the end have to pay to his ex-wife a portion of his earnings ..." - he additionally states in that memorandum that he believes that it might be warranted to obtain from the Applicant information on "the kind of subsistence he is currently giving to his former wife or, in the absence of such, to invite him to ensure that he supports his ex-wife financially with a minimum amount pending the determination ... by the competent courts"; as well as in additional correspondence on this subject. This is in stark contradiction to the prevailing policy, according to which, in cases such as this, only a court order should get the Administration involved in securing alimony and/or other financial entitlements for an ex-spouse.

IX. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to three months net base salary at the rate in effect on the date of this Judgement; and

2. Rejects all other pleas.

*(Signatures)*

Julio **Barboza**
President

Mayer **Gabay**
Vice-President

Spyridon **Flogaitis**
Member

New York, 20 November 2003

Maritza **Struyvenberg**
Executive Secretary